

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**OFFICE OF SPECIAL MASTERS**

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HEATHER HOCHNIUK,

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Petitioner,

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No. 99-509V

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Special Master Christian J. Moran

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v.

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SECRETARY OF HEALTH  
AND HUMAN SERVICES,

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Filed: November 24, 2009

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findings of fact, medical records  
not obtained

Respondent.

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*Clifford Shoemaker*, Shoemaker & Associates, Vienna, VA, for petitioner;  
*Debra Filteau-Begley*, United States Dep't of Justice, Washington, D.C., for respondent.

**FINDINGS OF FACT - NOT TO BE PUBLISHED\***

**I. Introduction**

Heather Hochniuk filed a petition pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 et seq. (2006) seeking compensation for injuries she alleges were caused by her receipt of the hepatitis B vaccine. According to Ms. Hochniuk, she was healthy before

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\* Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

receiving the hepatitis B vaccinations. Presently, however, Ms. Hochniuk claims that she suffers from an array of health problems, including chronic fatigue syndrome. Ms. Hochniuk attributes this change in her health to the hepatitis B vaccine, which was given to her in two doses on August 19, 1997, and August 4, 1998. Ms. Hochniuk's amended petition does not describe specifically which of her present health problems were caused by the hepatitis B vaccine. See Amended Pet., filed on July 9, 2004, at ¶¶ 93-94.

In addition, as explained in more detail below, the parties dispute the state of Ms. Hochniuk's health at the time that she received the vaccinations. Respondent questions whether, to at least some degree, the problems that Ms. Hochniuk currently suffers originated before the vaccinations. Resp. Rep't, filed Dec. 20, 2007, at 13-14. In addition, respondent questions whether Ms. Hochniuk's diagnosis of mononucleosis in June 1998 could be the source of her ailments. This ruling establishes the facts about Ms. Hochniuk's health from 1988 to the present.

Defining the state of Ms. Hochniuk's health immediately before and immediately after receiving the hepatitis B vaccine is a foundational step in adjudicating Ms. Hochniuk's claim. Respondent maintains that at least some of Ms. Hochniuk's problems existed before she received the two hepatitis B vaccinations. Resp't Rep't, filed Dec. 20, 2007, at 16-17. Not all existing evidence is consistent. Many of the contemporaneously created medical records do not document the symptoms or conditions as alleged by Ms. Hochniuk or her parents during their testimony. This inconsistency extends to Ms. Hochniuk's own narratives, some of which were created during litigation.

To determine what problems, if any, Ms. Hochniuk displayed before her first hepatitis B vaccination on August 19, 1997, a hearing was held in Philadelphia, Pennsylvania on September

29, 2008. See Campbell v. Sec’y of Health & Human Servs., 69 Fed. Cl. 775, 779-80 (2006); Skinner v. Sec’y of Health & Human Servs., 30 Fed. Cl. 402, 410 (1994). At this hearing, three witnesses (Michael Hochniuk, Ms. Hochniuk’s father; Karen Hochniuk, her mother; and Ms. Hochniuk herself) testified. All witnesses appeared credible in the sense that they intended to testify as honestly as possible. However, the completeness and accuracy of their testimony were limited by the witnesses’ observations about Ms. Hochniuk’s health approximately 11 years earlier and their ability to recall those observations when testifying.

The Vaccine Act permits a finding of when a first symptom appeared, despite the lack of a notation in a contemporaneous medical record. See 42 U.S.C. § 300aa-13(b)(2). The preponderance of the evidence standard requires that the Special Master "believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965)).

In weighing divergent pieces of evidence, contemporaneous written medical records are usually more significant than oral testimony. Cucuras v. Sec’y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993). However, compelling oral testimony may be more persuasive than written records. Campbell, 69 Fed. Cl. at 779 (“like any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking”); Camery v. Sec’y of Health & Human Servs., 42 Fed. Cl. 381, 391 (1998) (this rule “should not be applied inflexibly, because medical records may be incomplete or inaccurate”); Murphy v. Sec’y of Health & Human Servs., 23 Cl. Ct. 726,

733 (1991), aff'd, 968 F.2d 1226 (Fed. Cir. 1992). Whether contemporaneous medical records or later-given oral testimony is more persuasive is a determination that “is uniquely within the purview of the special master.” Burns v. Sec’y of Health & Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993).

Despite some efforts to obtain medical records from two providers, Dr. Mabel Hernandez and Dr. Birriel, Ms. Hochniuk failed to obtain them. This failure is unfortunate because Ms. Hochniuk saw these doctors during a time that closely surrounds the time that she received her two hepatitis B vaccinations. This failure to provide records is due in part to the conduct of petitioner’s attorneys.<sup>1</sup>

Regarding Dr. Birriel, more diligence from Ms. Hochniuk’s attorneys would have avoided a loss of potentially valuable medical records. Ms. Hochniuk filed a letter, dated May 26, 2004, from St. Joseph’s Hospital stating that “the patient was not treated at this facility. Please check your records.” Exhibit 28. At the undersigned’s instruction, Ms. Hochniuk issued a subpoena for records to a different address for Dr. Birriel. Order, filed March 3, 2009; exhibit 82. On March 5, 2009, Ms. Hochniuk’s attorney sent an updated request for medical records to Dr. Birriel’s office.

On March 13, 2009, Dr. Birriel’s office responded that Ms. Hochniuk was last seen by their office on February 25, 1998, and that those records were destroyed in 2006. Exhibit 82. The only medical record from Dr. Birriel is one page of patient statistics. The patient statistics page received from Dr. Birriel’s states that Ms. Hochniuk was first seen in February 1997 and her

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<sup>1</sup> Petitioners are supposed to file copy of their medical records with the petition. 42 U.S.C. § 300aa–11(c); Vaccine Rule 2(e). However, Ms. Hochniuk did not file her first set of medical records until November 21, 2003.

last visit was on February 25, 1998. Exhibit 82 at 8. However, due to the destruction of records in 2006, Dr. Birriel could not provide any details about his treatment of Ms. Hochniuk between February 1997, and February 1998. Had Ms. Hochniuk's attorneys appropriately followed-up on the request for medical records in 2004, Dr. Birriel's treatment records would have been available.

The situation for Dr. Hernandez appears to differ in that a lack of diligence by Ms. Hochniuk's attorneys did not cause a loss of evidence. Through her attorney, Ms. Hochniuk issued a subpoena to Dr. Hernandez for Ms. Hochniuk's medical records. Tr. 66. There was no response to this subpoena.<sup>2</sup> In addition, Ms. Hochniuk's parents attempted to communicate with Dr. Hernandez, but none of their phone calls or letters were returned. Id. During the hearing, petitioner presented exhibit 74, which appears to be a summary of a complaint filed against Dr. Hernandez with the Department of Health of the Florida Board of Medicine. Dr. Hernandez was fined for not providing a patient with a copy of her medical records. Exhibit 74. Thus, it appears that – for an unknown reason – Dr. Hernandez refuses to cooperate with requests to provide medical records for her patients.

When respondent learned in March 2009, that petitioner could have obtained records from Dr. Birriel if petitioner had acted with more diligence, respondent requested that “no inferences or assumptions be made in favor of petitioner based on the absence of Dr. Birriel's records.” Resp't Status Rep't, filed Mar. 30, 2009, at 4. Consequently, the parties given an opportunity to propose additional findings of fact, which the parties did in a submission made on

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<sup>2</sup> Ms. Hochniuk's attorneys shall file a statement describing their efforts to obtain records from Dr. Hernandez as soon as possible.

May 22, 2009. Later, petitioner submitted additional invoices and receipts from insurance companies that provide some additional information about medical treatment Ms. Hochniuk received in the relevant time period. Exhibit 83.

It is important to state that in finding facts, the undersigned has not drawn any adverse inferences against Ms. Hochniuk due to her failure to produce records from Dr. Birriel and Dr. Hernandez. To the extent that an adverse inference would be warranted, it is not clear what the adverse inference would be. Respondent has not proposed any adverse inference. See Second Chart of Contested and Uncontested Facts, filed May 22, 2009.

For the purposes of making findings of fact, the record consists of the testimony presented by the three witnesses and all the exhibits. After the hearing, the parties filed, on October 31, 2008, a Joint Statement of Contested and Uncontested Facts to be decided by the Special Master and, on May 22, 2009, a Second Chart of Contested and Uncontested Facts. This fact decision resolves the contested facts.

## **II. Findings of Fact**

As noted above, the critical time surrounds Ms. Hochniuk's first and second hepatitis B vaccinations. Ms. Hochniuk received two hepatitis B vaccinations while she was in junior high school. Therefore, this fact decision is divided into three sections: before the first vaccination, between the two vaccinations, and after the second vaccination.

### **A. Before The August 19, 1997 Vaccination**

#### **1. General Findings**

Ms. Hochniuk was born on August 26, 1984. Tr. 161. Ms. Hochniuk describes her health before receiving the hepatitis B vaccinations as "excellent." Exhibit 44 (affidavit of Ms.

Hochniuk, dated April 29, 2007, at 1). She was physically active in tae kwon do, cheerleading and aerobics. Ms. Hochniuk had fun with her family, enjoyed talking on the phone, making pieces of artwork, listening to music, dancing, horseback riding and swimming. In addition, Ms. Hochniuk was a straight A student, and specifically excelled in her math and English courses. She also tutored eighth and ninth grade students while she was only in seventh and eighth grade herself. Id. at 2, tr. 162-163.

Ms. Hochniuk began competing in the sport of tae kwon do at the age of eight or nine and continued to compete over the next 6 years. She had classes and trained at least three times a week with additional hours of private lessons. Ms. Hochniuk earned a national black belt and was awarded trophies and medals for her achievements. She competed in state and national competitions and eventually began competing in the U.S. Open and Junior Olympics. Tae kwon do became Ms. Hochniuk's "sport of passion" and after some time, she began to focus solely on school and tae kwon do. Tr. 162-163.

Ms. Hochniuk experienced a number of illnesses during her childhood, which Ms. Hochniuk categorizes as "normal childhood illnesses." Exhibit 1 at 4-8; exhibit 3 at 3-4; tr. 9-10, tr. 163. Whether these conditions affect Ms. Hochniuk's claim for compensation awaits development from an expert. The parties do not dispute that Ms. Hochniuk had colds, ear infections, and runny noses, etc. as a child.

**a.      Ms. Hochniuk's Health Before  
the August 19, 1997 Vaccination**

In 1988, at the age of four, Ms. Hochniuk was seen by her pediatrician for a well-baby visit. The physician notes that Ms. Hochniuk "is having some real problems with allergic rhinitis

... Past medical history, was meconium stained, has had insignificant past history since.” Exhibit 3 at 4.

In 1989, Ms. Hochniuk was seen by her physician three times for a sore throat and was treated with antibiotics. During that same year, she was also seen for a skin rash which was treated with Benadryl. She was rechecked by the physician several weeks later. Exhibit 3 at 4.

In 1990, Ms. Hochniuk was seen by Dr. Bonnet for complaints of “not breathing right, not enough breath.” She was diagnosed with mild asthma and was treated with Ventolin.<sup>3</sup> That same year, Ms. Hochniuk was treated for “atopic dermatitis.” Exhibit 3 at 4.

In 1991, Ms. Hochniuk was treated twice for chest congestion. That same year, she was also treated with antibiotics for fever, sore throat and sniffles. Exhibit 3 at 3.

In April 1992, Ms. Hochniuk was treated for mild eczema and for a follow-up of her asthma. The physician notes that Ms. Hochniuk “is using her Ventolin Inhaler and doing pretty well. . . Will continue the Ventolin. If she gets any worse we will add Azmacort.”<sup>4</sup> Id.

In February 1993, Ms. Hochniuk experienced sinus congestion and complained that her ear hurt. She was treated with Septra and Tavist D. The next month, Ms. Hochniuk went to her physician twice complaining of a cough and that her ears were popping. She was treated with a Ventolin inhaler, Triaminic and Beconase nasal spray. Id.

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<sup>3</sup>The web site [www.ventolin.com](http://www.ventolin.com) indicates that Ventolin is an albuterol inhaler that treats bronchospasm by opening quickly the airways within the lungs to ease breathing during an asthma attack.

<sup>4</sup> The web site [www.azmacort.com](http://www.azmacort.com) indicates that azmacort (triamcinolone acetonide) is used prophylactically as part of maintenance therapy for people with asthma.

In 1994, Ms. Hochniuk was treated for a skin rash with ointment. She also received a refill of her Ventolin inhaler for her asthma. Exhibit 1 at 7. In 1995, Ms. Hochniuk received a refill of her skin ointment. Id. at 6.

In March 1996, Ms. Hochniuk received a refill of her Ventolin inhaler. Later that month, she contacted her doctor complaining of an “annoying cough.” A week later, Ms. Hochniuk reported to her physician a past medical history of environmental allergies. She was taking “PSE,” which is probably pseudoephedrine, and Keflex. Exhibit 1 at 5-6.

On March 27, 1996, a progress note indicates that Ms. Hochniuk used her “Ventolin inhaler once a day before karate.” She was also diagnosed with resolving sinusitis. On April 18, 1996, Ms. Hochniuk reported that she improved on Keflex but that her symptoms returned. She was prescribed Z-Pack antibiotics. Exhibit 1 at 5.

On June 10, 1996, Ms. Hochniuk complained that she was congested. She was treated with Z-Pack antibiotics. On December 13, 1996, she was given a refill of her Ventolin inhaler. Exhibit 1 at 4.

In February 1997, Ms. Hochniuk was seen by Dr. Birriel, a pulmonary specialist. Exhibit 82. The one-page record from Dr. Birriel indicates that Ms. Hochniuk was treated for Diagnosis Code 493.90. Exhibit 82 at 8. Diagnosis Code 493.30 is used for the following conditions: asthma, unspecified; asthma (bronchial); bronchitis; allergic; and asthmatic. Resp’t Status Rep’t, filed Mar. 30, 2009, exhibit A. A reasonable inference from this record is that Ms. Hochniuk

was experiencing some difficulties with breathing. Dr. Birriel prescribed asthma medication for Ms. Hochniuk. Tr. 88-89.<sup>5</sup>

Ms. Hochniuk's menarche began in June 1997. Exhibit 1 at 3.

On August 19, 1997, Ms. Hochniuk was seen by Dr. Sweetbaum. Ms. Hochniuk reported that she had a past medical history of "HAD." (The meaning of "HAD" is not clear.) The medical record from that day also indicates that Ms. Hochniuk was experiencing enlarged tonsils. She was using a Vanceril inhaler at the time. Exhibit 1 at 3.

Based on the evidence in the record, a finding is made that Ms. Hochniuk used her inhalers primarily for preventative purposes, particularly in tae kwon do. She never had any serious asthma attacks prior to her August 19, 1997 vaccination.<sup>6</sup> Tr. 163-164. Although Ms. Hochniuk may have been experiencing some issues with her asthma at this time, her asthma issues do not appear to be severe based upon Ms. Hochniuk's own assessment. Both her mother's testimony and her father's testimony concurred with this statement. Tr. 76-77, 281.<sup>7</sup>

Ms. Hochniuk experienced a number of mild illnesses in the years before her vaccination. She developed asthma at the age of six. Ms. Hochniuk's parents refilled her asthma inhalers

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<sup>5</sup> Whether Ms. Hochniuk actually had asthma is not clear. Dr. Birriel, apparently, believed that she may have had asthma because he prescribed medicines used to treat asthma. However, there was not certainty about this diagnosis. Tr. 93.

<sup>6</sup> Ms. Hochniuk was treated by Dr. Birriel for asthma. However, the medical records from Dr. Birriel are not available. Exhibit 28, exhibit 82.

<sup>7</sup> Conceivably, a doctor could have found Ms. Hochniuk's asthma was "severe." So, the absence of records from Dr. Birriel is unfortunate. However, if Dr. Birriel believed that Ms. Hochniuk's asthma were severe, then presumably Dr. Birriel would have told the Hochniuks. Although the Hochniuks, conceivably, could have been lying when they testified that Heather's asthma was not severe, they appeared credible when they testified about the (lack of) severity in Ms. Hochniuk's asthma before vaccination.

when they expired and kept inhalers in various locations in case they were needed. Ms. Hochniuk did use her inhaler as a preventive measure prior to her tae kwon do competitions although she did not use her inhaler regularly, i.e., on a daily basis. There are no indications in the contemporaneously created and filed medical records that Ms. Hochniuk experienced any asthma attacks or any other major episodes with her asthma.<sup>8</sup>

Ms. Hochniuk also experienced a number of skin problems and allergies that were controlled with the proper medications. She had a number of colds, congestion and coughing all of which were resolved.

**b. Ms. Hochniuk's Academic Performance before  
the August 19, 1997 Vaccination**

In general, Ms. Hochniuk excelled in school prior to August 19, 1997. In the two years prior to her vaccination, Ms. Hochniuk was a straight A student. Exhibit 39 at 43, 45-47; tr. 11-12. She scored in the 99th percentile in math on the Stanford Achievement Test. Exhibit 39 at 45. From December 1996 to February 1997, Ms. Hochniuk participated in the "Duke University Talent Search for the Mathematically Gifted 7<sup>th</sup> Graders." Exhibit 29 at 41. She also tutored eighth and ninth grade students when she herself was only in seventh and eighth grade. Tr. 163, exhibit 39 at 50-51, exhibit 44 at 2.

**c. Ms. Hochniuk's Extracurricular Activities before  
the August 19, 1997 Vaccination**

Ms. Hochniuk excelled at tae kwon do. Prior to August 1997, she was in her fourth or fifth year of tae kwon do. Tr. 11-12. She practiced three to six times a week in both classroom

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<sup>8</sup> Unfortunately, this sentence is limited to the records that were filed. Ms. Hochniuk failed to file the records of Dr. Birriel, the person who was most likely to have recorded a major problem with breathing between February 1997, and February 1998.

and private classes and competed in various tournaments. Ms. Hochniuk was a member of a rigorous training program for state and national competitors. She received a number of medals in these tournaments including two medals when she competed in the Junior Olympics. Exhibit 32, exhibit 44 at 2 ¶11; tr. 15-16. She was training in a gym with, in her words, the “best of the best.” Exhibit 23 at 29.

**B.     The Time Period Between the August 19, 1997 Vaccination and the August 4, 1998 Vaccination**

On August 19, 1997, Ms. Hochniuk received her first hepatitis B vaccination. Exhibit 1 at 3, 9; tr. 165. Later that evening, she developed a rash on her cheek which lasted “a few days.” Within 24 hours, Ms. Hochniuk developed a headache that lasted “a day or two.” She also experienced fatigue and a tiredness that “lasted for in(sic) that intensity for about a week.” Tr. at 17, tr. 80-83, tr. 166, tr. 206-207; see also exhibit 19 at 39-43 (report of Dr. Schiff). Ms. Hochniuk also complained that her “arm was sore” around the location of the injection of the hepatitis B vaccination. Tr. 34, tr. 280. Although Ms. Hochniuk had not experienced headaches like this before, her parents were not particularly concerned and did not immediately seek medical attention. Tr. 83-84.

A preponderance of the evidence supports findings that within 24 hours of the August 19, 1997 vaccination, Ms. Hochniuk had a rash on her cheek which dissipated in less than 2 days, that she experienced a mild headache which lasted for less than 2 days and that she experienced mild muscle soreness in the location of the injection of the hepatitis B vaccination which resolved in less than 24 hours. Ms. Hochniuk also experienced some fatigue but that any problems with fatigue resolved within a week following the August 19, 1997 vaccination.

Although these symptoms are not reported in the medical records, they are not of such severity that a 13-year old would normally seek medical attention.

Approximately one month after Ms. Hochniuk received the hepatitis B vaccination, during Labor Day weekend and while traveling with her family, she contracted pinworms. Tr. 167. Ms. Hochniuk's parents contacted Dr. Sweetbaum who prescribed Mebendazole. Tr. 18-19, tr. 282-283. The issue resolved within two months. Id., tr. 20. Although Dr. Sweetbaum's medical records do not note this incident, the testimony about it was vivid and consistent. In addition, because the Hochniuks's consultation with Dr. Sweetbaum was by telephone and the pinworms resolved, there is less expectation for a written record.

Ms. Hochniuk continued training in tae kwon do "like [she] usually does." Tr. 167. She was regularly training for sessions that lasted two hours or more to prepare for her black belt testing in November. Id. at 168. Although she felt "off in some sort of way," Ms. Hochniuk "was still training, and [she] was having a good time. [She] was doing well in school." Id.; tr. 87.

When Ms. Hochniuk took her black belt test in November 1997, she began experiencing some breathing difficulties and dizziness. Tr. 168. Testing for a black belt was a significant event in Ms. Hochniuk's life. Tr. 87, tr. 167-168. During the black belt test, her parents saw her arm begin to tremble. Tr. 21, tr. 284. In an attempt to alleviate her breathing problems, Ms. Hochniuk took a break and took a couple of puffs of her inhaler although, she testified, that it did not relieve any of her symptoms. Although she felt "off", she continued with her training. Tr. 22, tr. 167. Although Ms. Hochniuk's parents were concerned enough about this incident to consider taking Ms. Hochniuk to the emergency room, they ultimately decided not to go to a

doctor on that date. Tr. 22, tr. 170, tr. 284. And although not completely clear, it appears that Ms. Hochniuk did complete her black belt testing on that day. Tr. 169-170, tr. 285.

A preponderance of the evidence supports a finding that Ms. Hochniuk experienced some breathing difficulties and dizziness during her November 1997 black belt competition, but that this episode was not so severe that she needed to be seen immediately by a physician. Ms. Hochniuk proposed that during the November 1997 black belt competition, she was “disoriented.” Statement of Contested and Uncontested Facts, filed Oct. 31, 2008, at 12, citing tr. 168. However, Ms. Hochniuk did not testify that she felt “disoriented.” See tr. 168. Thus, the undersigned does not find that Ms. Hochniuk was disoriented.

Her breathing difficulties and dizziness resolved the same day as Ms. Hochniuk was able to resume her black belt testing. Respondent seemed to suggest that Ms. Hochniuk’s breathing trouble may have a psychological origin. See tr. 231-232; exhibit 8 at 3 (noting perfectionist streak). At least one doctor suggested that Ms. Hochniuk may have had a panic attack. However, this finding was not confirmed. Tr. 216. Without guidance from an expert, no finding about the cause of the breathing difficulties is being made. This decision finds only that Ms. Hochniuk did, in fact, have difficulty breathing during her black belt examination.

Ms. Hochniuk did not see a physician (Dr. Birriel) until approximately one month later. Tr. 29, tr. 88-89. (No records have been produced from Dr. Birriel, although the medical records do indicate a referral to Dr. Birriel. Exhibit 1 at 8, exhibit 28, exhibit 82.) Ms. Hochniuk had already been seen by Dr. Birriel prior to her episode at the black belt testing and there is no indication that her later visit to Dr. Birriel was in response to her breathing difficulties at the black belt testing. Ms. Hochniuk’s physician at the time, Dr. Mabel Hernandez, also had a

daughter who was involved with tae kwon do and who frequently interacted with Ms. Hochniuk. Tr. 22, tr. 169-170. After the episode at Ms. Hochniuk's black belt testing, Dr. Hernandez recommended that Ms. Hochniuk see Joseph Audette for her asthma. Tr. 23-24, tr. 223, tr. 285.

Ms. Hochniuk withdrew from tae kwon do training in January/February of 1998. According to her father, Ms. Hochniuk experienced "breathing difficulties and health concerns" in January/February of 1998 and had to withdraw from training for the U.S. Open for tae kwon do. Tr. 92. Although Ms. Hochniuk withdrew from training, her parents did not send her to a doctor except Dr. Birriel for her asthma. Tr. 93; exhibit 1 at 8, exhibit 26 at 12.

In the spring of 1998, Ms. Hochniuk continued to excel academically. Exhibit 39 at 42-44, tr. at 28. On February 27, 1998, she took the "Secondary School Admission Test" (SSAT). Ms. Hochniuk's scores ranged from the 87th to 96th percentile on the national percentile and in the 59th to 80th percentile on the SSAT percentile scale. She received all A's as her final grades for the 1997-1998 school year. Exhibit 39 at 46. Ms. Hochniuk also scored in the 71st to 97th percentile on the Stanford Achievement Test for school year 1997-1998. She scored in the 97th percentile in math. Exhibit 39 at 43.

Ms. Hochniuk began seeing Joseph Audette, a registered respiratory therapist, on March 11, 1998, for treatment of her asthma. Mr. Audette's letterhead identifies him as a doctor of naturopathic medicine although he is not a medical doctor. Exhibit 15, tr. 30-33. On her intake form, Ms. Hochniuk reported that her major complaints were "1) asthma, 2) tear upper right leg." She also reported taking Accolate, Vanceril, Ventolin and Intal. Exhibit 15 at 30. A summary of Ms. Hochniuk's complaints on Mr. Audette's progress notes include asthma, tightness on her sternum, cold fingers and toes, and trouble sleeping. Exhibit 15 at 29, exhibit 83 at 35.

On March 18, 1998, Ms. Hochniuk went to Mr. Audette with several complaints including “asthma, tightness on sternum.” She reported that she did not have any asthma attacks but that she was experiencing “increased tightness.” Ms. Hochniuk also reported that her sleep had improved, that she had a good temperament and “decreased drinking.” Id.

On March 26, 1998, Ms. Hochniuk again presented to Mr. Audette with complaints of “asthma, tightness on the sternum. SS: Mens. 7 days + heavy. No asthma attacks, no tightness. Slight dizziness - visual, sleep - improved. Increased thirst. Increased vexation.” Exhibit 15 at 27.

Ms. Hochniuk presented to Mr. Audette on April 3, 1998, with complaints of asthma, tightness in the chest “once this week.” The progress note states that Ms. Hochniuk’s thirst, dizziness and sleep were improving but that she has a hard time breathing. Exhibit 15 at 26.

Ms. Hochniuk presented to Mr. Audette on April 21, 1998, with similar complaints including asthma, pain, tightening, feeling “slightly tired”, sweating in her hands and feet, low energy, soreness in the middle of her back, dizziness, feeling hot, and feeling thirsty. Exhibit 15 at 24.

On May 15, 1998, Ms. Hochniuk again saw Mr. Audette. A summary of Ms. Hochniuk’s complaints included issues with asthma, coughing, dizziness, tired, trouble breathing in, and heavy menses every two weeks. Exhibit 15 at 23, exhibit 83 at 35.

On May 19, 1998, Ms. Hochniuk presented to Mr. Audette. The progress note from that visit states: “CC: asthma (back injury from kick). SS: coughing with exercise; dizziness imp. Sleep ok, Stools ok 1/day. ‘trouble breathing in’, tired, hearts walking, mens: no mens: which is ok.” Exhibit 15 at 22.

On May 28, 1998, Mr. Audette notes that Ms. Hochniuk presented to him with complaints of: “CC: asthma. SS: coughing with exercising, trouble breathing in, less tired, mens. 4 days, dizziness sl. impr., sleep ok, stool / 2 -3 X 1 D, sl. palpation.” Exhibit 15 at 21.

Ms. Hochniuk presented to Mr. Audette on June 9, 1998, with a chief complaint regarding her “[Left] elbow” and asthma. Other complaints included cough when exercising, dizziness slightly improved, feeling hot, weak ankles, sore throat, tiredness and swollen glands. Exhibit 15 at 20.

Ms. Hochniuk saw Mr. Audette on June 12, 1998, complaining of laryngitis, swelling joints, dizziness on rising, stiff neck, nose bleeds and loose stools. Exhibit 15 at 18.

Ms. Hochniuk tested positive for mononucleosis on June 15, 1998. No finding is made as to when the mononucleosis began. The June 15, 1998 is the date when the mononucleosis was detected. Exhibit 40 at 3-4, exhibit 83 at 36, tr. 90, tr. 170. The next day, on June 16, 1998, Mr. Audette noted mononucleosis in his progress note. Exhibit 15 at 17.

Ms. Hochniuk’s father testified that just prior to her mononucleosis diagnosis, Ms. Hochniuk was experiencing fatigue. Tr. 91. However, Mr. Audette notes that Ms. Hochniuk’s fatigue seemed to improve just prior to her diagnosis of mononucleosis. Exhibit 15 at 21. While Ms. Hochniuk may have experienced some fatigue in the months prior to her diagnosis of mononucleosis, it appears that her fatigue improved approximately 2 weeks before her diagnosis. Id.

Ms. Hochniuk returned to Mr. Audette on June 19, 1998, and June 24, 1998, with similar complaints. A progress note on June 24, 1998, indicates, among other complaints, that Ms. Hochniuk was “tired”. Exhibit 15 at 33.

On June 29, 1998, Mr. Audette's progress note states: "CC: Mono. SS: wrist hurts, nodes increasing on L, sweating, spont: + noc., stools 1-2x x 1 day, cold to hot, pressure as if H2O in ear, tired, increased thirst." Exhibit 15 at 14.

Ms. Hochniuk returned to Mr. Audette on July 3, 1998. The progress note from that date states: "Cc: mono. SS: muscles ache, dry - throat, Pressure in ears + H/A when jump roping, stools 1-2 x say, increased thirst, tired, hot to cold, sl, palpitation." Exhibit 15 at 13.

On July 10, 1998, Ms. Hochniuk again presented to Mr. Audette. Mr. Audette's progress note from that date states "CC: mono. SS: muscle ache, spont., sweating, pressure in ears imp, H/A imp., stools 1-2x day, reg. Thirst, sl. Hot then cold, no palpitations." Exhibit 15 at 12.

Although Ms. Hochniuk tested positive for mononucleosis, she continued to train in tae kwon do although she was not "feeling well." Tr. 30, 170. On July 11, 1998, she competed in the U.S. National Junior Olympics in tae kwon do. Tr. 99, tr. 173. She stated that the mononucleosis "did not stop [her]" that she "took a little rest and [she] continued training." Tr. at 173-174. However, Ms. Hochniuk experienced an "episode" during the tournament where she "couldn't get breath" and she experienced "dizziness and those same kind of feelings again." Tr. at 212-3. Ms. Hochniuk was told by one of her physicians that this "episode" was probably a panic attack. Tr. 213-216. A preponderance of the evidence supports a finding that Ms. Hochniuk continued to excel in tae kwon do. A finding is also made that Ms. Hochniuk experienced mild difficulties with her breathing and with dizziness but that these issues resolved within the same day.

It is noted that Ms. Hochniuk did not complain to Mr. Audette of problems with her asthma from June 16, 1998, until July 31, 1998, when her complaints of asthma resumed.

On July 31, 1998, Ms. Hochniuk presented to Mr. Audette. The progress note from that date states “CC: Mono. Asthma. SS: throat dry in a.m., sleep - getting to sleep, stool 1-2 - ok, thirst a.m., \* spont. sweating still, no palpitation, exercise induced asthma, energy sl. Imp., mens, heavy - bright red, heavy.” Exhibit 15 at 11.

Ms. Hochniuk stated that by August 4, 1998, the mononucleosis “was mostly out of [her] system.” Tr. 174.

On August 4, 1998, Dr. Hernandez administered a second dose of the hepatitis B vaccine to Ms. Hochniuk. Exhibit 51 at 2, 5-6; tr. at 174.

**C. The Time Period After the August 4, 1998 Vaccination**

The morning after the August 4, 1998 vaccination, Ms. Hochniuk noticed that she had a rash or a “red blotch” on her cheek, which disappeared within a week. She also got a headache which lasted a day or two but the headache would come back intermittently. Tr. at 100, tr. 175, tr. 178, tr. 227. Ms. Hochniuk also felt tired again, but instead of the fatigue dissipating, it continued to get worse. Tr. 175; see also exhibit 19 at 39 (Dr. Schiff’s notes).

Ms. Hochniuk went to see Dr. Hernandez because she was not feeling any better. Tr. 101-103 (testimony of Michael Hochniuk), tr. 178 (testimony of Ms. Hochniuk), tr. 288-289 (testimony of Karen Hochniuk). Although Ms. Hochniuk has attempted to obtain the medical records of Dr. Hernandez to confirm this visit, these efforts have been unsuccessful. However, Ms. Hochniuk’s testimony that she saw Dr. Hernandez is credited. This is not a situation where the contemporaneously created medical records conflict with the testimony of the petitioner. Rather, in this situation the medical records are not available.

The evidence about the date when Ms. Hochniuk saw Dr. Hernandez is not consistent. The latest possible date for this appointment is November 3, 1998, because on that date Dr. Rhoden addressed a letter to Dr. Hernandez. Exhibit 8 at 2-4. The evidence for the earliest possible date is the testimony of Karen Hochniuk, Ms. Hochniuk's mother. She testified that her daughter saw Dr. Hernandez approximately 3-4 days after Ms. Hochniuk received her second hepatitis B vaccination on August 4, 1998. Tr. 288. This would place her visit with Dr. Hernandez around August 7-8, 1998. Ms. Hochniuk, herself, testified that she saw Dr. Hernandez "within a week or two" after the second vaccination. Tr. 178. A middle date comes from the testimony of Ms. Hochniuk's father. He testified that as early as October 1998, Dr. Hernandez was "concerned about the reaction to the Hep B vac and started a series of tests that continued from that point." Tr. 103.

Ultimately, whether Ms. Hochniuk saw Dr. Hernandez in August 1998, September 1998, or October 1998, is probably not important. Even a visit on October 27, 1998, which is 84 days after the August 4, 1998 vaccination, would have occurred relatively contemporaneously with the vaccination. To the extent it is relevant, the most likely date for Ms. Hochniuk's appointment with Dr. Hernandez is likely early to mid-October 1998. The reason for selecting this date is that on October 28, 1998, Ms. Hochniuk saw Mr. Audette whose notes say that Ms. Hochniuk was complaining about a hepatitis B vaccination. Exhibit 15 at 7. In addition, Ms. Hochniuk filed, as exhibit 83, the Explanation of Benefits from her health care carrier, indicating two dates where services were conducted, October 7, 1998 and October 16, 1998. There are handwritten notes stating "Hernandez" on these exhibits, presumably made by Mr. Hochniuk, indicating that these visits involved Dr. Hernandez. Although relayed by Ms. Hochniuk, the source for the statement

that Ms. Hochniuk may have been suffering from a reaction to hepatitis B was Dr. Hernandez.  
Tr. 289.

Dr. Hernandez's assessment of Ms. Hochniuk is probably more important than determining exactly when the assessment was made. Dr. Hernandez told the Hochniuks that Ms. Hochniuk may have had a reaction to the hepatitis B vaccine. Tr. 35-36 (Mr. Hochniuk), tr. 179 (Ms. Hochniuk), tr. 288 (Ms. Karen Hochniuk).<sup>9</sup>

On August 30, 1998, Ms. Hochniuk saw Mr. Audette. The progress note states  
"CC:Asthma/ asthma mono. SS:Energy, feels tired. Intal - a.m. p.m. + exercise, exercise  
dizziness, SOB (shortness of breath), Sleep - imp. Stool, 1-2 ok, sl spont. sweating, Ventolin - 2

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<sup>9</sup> This finding about what Dr. Hernandez said does not require a finding that the hepatitis B vaccination *caused* Ms. Hochniuk's illnesses for two reasons.

First, Ms. Hochniuk's parents testified that Dr. Hernandez stated that Ms. Hochniuk *may be* having a reaction to the hepatitis B vaccination. A statement from a treating doctor simply stating that petitioner may be having a reaction to a vaccine is not proof of causation. A "possibility" cannot establish a medical theory to prove causation. Van Epps v. Sec'y of Health & Human Servs., 26 Cl. Ct. 650, 654 (1992); Doe v. Sec'y of Health & Human Servs., 19 Cl. Ct. 439, 450 (1990) ("an assertion that something is 'highly possible' does not rise to the level necessary to establish causation by a preponderance of the evidence"); Snowbank Enter. v. United States, 6 Cl. Ct. 476, 486 (1984) (mere conjecture or speculation does not establish a probability); Duncan v. Sec'y of Health & Human Servs., No. 90-3809V, 1997 WL 75429, at \*4 (Fed. Cl. Spec. Mstr. Feb. 6, 1997) ("The court notes further that [petitioner's expert] is unwilling to state his opinion to a reasonable degree of 'medical probability' but as 'a possibility' only, a standard that cannot support a finding of a preponderance of evidence."); Lacour v. Sec'y of Health & Human Servs., No. 90-316V, 1991 WL 66579, at \* 5 (Cl. Ct. Spec. Mstr. Apr. 15, 1991) ("Expert medical testimony which merely expresses the possibility – not the probability – of the occurrence of a compensable injury is insufficient, by itself, to substantiate the claim that such an injury occurred.").

Second, even if Dr. Hernandez stated, without equivocation, that Ms. Hochniuk did suffer an adverse reaction to the hepatitis B vaccine, this statement would not be sufficient. There is no evidence explaining why Dr. Hernandez associated Ms. Hochniuk's ailments and the hepatitis B vaccination. Ms. Hochniuk's burden includes the requirement to establish, by preponderance of the evidence, a medical theory. Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Dr. Hernandez's statement, as recounted by the Hochniuks, does not fulfill this element of Ms. Hochniuk's case.

puffs a.m. exercise, PRN, mens - ok with brown, 5/6 days, nearsightedness getting worse.”

Exhibit 15 at 10.

On September 12, 1998, Ms. Hochniuk went to see Mr. Audette who noted complaints including asthma and mono. The progress note indicates that Ms. Hochniuk was dizzy when it was hot, bright lights and loud rooms bothered her, her vision was slightly worse, her energy improved, decreased breathing sounds, tachycardia, and spontaneous sweating. Exhibit 15 at 9.

In the fall 1998, Ms. Hochniuk entered the ninth grade. Tr. 176. She continued to received good grades, receiving an overall GPA of 3.75. Exhibit 11 at 2. However, due to her lack of energy, Ms. Hochniuk stopped training in a formal tae kwon do class around October 1998, although she continued to take private lessons at her home in her driveway. Tr. 41, tr. 176. Ms. Hochniuk continued to see Mr. Audette and Dr. Hernandez.

On October 14, 1998, Ms. Hochniuk saw Mr. Audette with complaints of asthma, bruising, and dizziness. Exhibit 15 at 18. During an October 28, 1998 visit to Mr. Audette, Ms. Hochniuk reported “tremors in [her] right arm.” Exhibit 15 at 7, tr. 231.

Ms. Hochniuk did not feel rested, that she was slow in getting out of bed, and had trouble getting to school on time.<sup>10</sup> She was having a harder time staying focused in school. She was having to study more to sustain her current grades. Tr. 146-147, tr. 287-288.

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<sup>10</sup> Although Ms. Hochniuk’s mother testified that Ms. Hochniuk stayed in bed 20 to 24 hours at a time, tr. 146; this testimony is not accepted as literally accurate. While Ms. Hochniuk may have stayed in bed longer than usual, it would seem that if she stayed in bed for nearly an entire day, her parents would have sought medical attention. Ms. Hochniuk’s parents seemed to be attentive parents who cared for the well-being of Ms. Hochniuk. A symptom as unusual as staying in bed for nearly 24 hours would most likely have prompted them to seek medical attention for their daughter.

In October 1998, Ms. Hochniuk was given a prescription for Klonopin, although she testified that she never took any of the pills. Tr. 215-216. Ms. Hochniuk's testimony that she did not take any of the Klonopin is credited because it appears that only one prescription of the Klonopin was filled and no other prescriptions were either requested or filled. Exhibit 84 at 12.

On October 28, 1998, Ms. Hochniuk saw Mr. Audette who noted the following in his progress notes: "CC: Hep B Vac. SS: July Aug o.k./ mono in June. Sept 4 –, sleeping poor, tremors in R arm – blank stares – joints ache, H/A on sides of head / dizziness, blank stares – vexation. BM 1-2x." Exhibit 15 at 7. Mr. Audette's October 28, 1998 note appears to be the first time anyone suggested, in writing, that Ms. Hochniuk reacted adversely to the hepatitis B vaccine.<sup>11</sup>

In November 1998, Ms. Hochniuk was referred by Dr. Hernandez to Dr. Rhoden, a pediatric cardiologist. Exhibit 8 at 2-4. Dr. Rhoden's progress note from this visit states: "Occasional chest pain – has had for almost forever. Asthma diagnosed at 4 years. Told pain came from constriction. 2 years were really bad. Last year was ok now started up again. 5x in past 2 months. Worse with exercise – does Tae Kwon Do. Compete and rigorous training. Located in the center of her chest. Hurts to take a deep breath – sharp pain. Last any where from a couple of secs to couple minutes. Just goes away if she calms down, worsens if she worries." The note also indicates "Stresses over little things – perfectionist." Exhibit 8 at 2-4.

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<sup>11</sup> As discussed in footnote 9, above, Dr. Hernandez's statement to the Hochniuks does not establish, by a preponderance of the evidence, that the hepatitis B vaccine caused an adverse reaction to Ms. Hochniuk. Mr. Audette's repetition of Dr. Hernandez's statement in several progress notes does not strengthen Ms. Hochniuk's case. Ms. Hochniuk has not established that Mr. Audette, a respiratory therapist, is qualified to determine that the hepatitis B vaccine caused an adverse reaction.

During the month of November 1998, Ms. Hochniuk wore a heart rate monitor. The progress note regarding her heart monitor states: “Her electrocardiogram demonstrates sinus arrhythmia, normal intervals and normal forces. An echocardiogram was entirely normal. No mitral valve prolapse and normal left ventricular size and function.” Id at 2. In addition, it states, “[w]e are going to get her an event monitor so she can transmit when she has this pain to rule out arrhythmia.” Id. The Heart Monitor Report had noted symptoms such as: “Hard to breath deep, when I got up I felt dizzy, left sided head pain, and pressure in head.” Exhibit 8 at 5, exhibit 83 at 16.

On November 3, 1998, Dr. Rhoden sent a letter to Dr. Hernandez summarizing her visit with Ms. Hochniuk. In that letter Dr. Rhoden stated: “It is my assessment that [Ms. Hochniuk] has chest pain more than likely non-cardiac in origin. She has a perfectionist personality and I believe the chest pain is a somatic complaint related to that.” Exhibit 8 at 11.

Ms. Hochniuk went to see Mr. Audette on November 7, 1998. The progress note from that visit states: “CC: Hep B Vac. Reactions. SS: Sleep – hard to get. Sleeps in fetal position, head sweats/grinding. No tremors, H/A – less freq. – less often. Joint aches imp. Vexation – imp. B.M. 1-2 x/day. Yawning. Mens started. Brain fog. Dizziness visual.” Exhibit 15 at 6.

Ms. Hochniuk stopped taking structured tae kwon do classes in September 1998 and then stopped her private lessons in November/December 1998, due to a lack of energy and achiness. Tr. 38, tr. 177, exhibit 19 at 31-33.

On November 11, 1998, Ms. Hochniuk saw Mr. Audette with complaints of headaches, dizziness, cold hands and feet and a brain fog. The progress note from that visit states: “CC: Hep. B Vac. Detox. SS: mens – 5 days, 2 heavy, 1 light. H/A imp, 2-3 dizziness, hands and feet

cold, sleep imp., B.M. 1 -2 + sl. const. dry. Joint aches imp. Brain fog.” Exhibit 15 at 5.

Three days later, on November 14, 1998, Ms. Hochniuk again presented to Mr. Audette. She still complained of headaches at her temples, dizziness, joint aches and memory problems. The progress note from that visit states: “CC: Hep. B. Detox. SS: H/A temples, memory worse, dizziness same, hands and feet – sl. imp. , sleep – ok, energy – sl. imp., B + M 1-2 sl. loose, joint aches worse.” Exhibit 15 at 4.

On December 1, 1998, Ms. Hochniuk went back to Mr. Audette with the same complaints of headaches, memory problems, dizziness, cramps on her back and shoulders, joint aches, and slightly loose bowel movements once to twice a day. Ms. Hochniuk reports some improved energy. The progress note from that visit also states: “? Epstein Barr, ? Thyroid.” Exhibit 15 at 3.

Ms. Hochniuk presented to Dr. Schiff the next day, December 2, 1998. Dr. Schiff was the Director of Clinical Immunology at Miami Children’s Hospital. Dr. Schiff stated that Ms. Hochniuk “had been a very active athletic young woman who was doing well in school. She had a mild increase in her asthma in 1997, but has not had any problems since. She had mono in June but seemed to be recovering until she had the HBV in September. Since then, she had a progressive increase in symptoms of dizziness, lightheadedness, and difficulty concentrating.”

Dr. Schiff also noted: “chronic fatigue, possible reaction to the Hepatitis B vaccination.” Dr. Schiff’s recounting of what the Hochniuks told him how Ms. Hochniuk felt immediately after receiving the August 19, 1997 vaccination and the August 4, 1998 vaccination has been incorporated into the paragraphs discussing Ms. Hochniuk’s condition. Exhibit 19 at 39-43.

Dr. Schiff's note also stated that Ms. Hochniuk "has had panic attacks that have been treated with Clonopin [sic]."<sup>12</sup> Exhibit 19 at 39. Dr. Schiff also notes that Ms. Hochniuk "has some evidence of autoimmune disease and ongoing immune activation." He states "whether this is due to the Hepatitis B vaccine or some combination of the vaccine that was given following viral illness, cannot be sure but we should further evaluate her in terms of cytokine production and looking for elevation in immune parameters." Dr. Schiff also notes the following medications: "Zantac, 150 mg bid, Daypro, 600 mg bid, Clonopin, ½ mg bid [sic]." Exhibit 19 at 40.

Dr. Schiff's December 2, 1998 note/report contains a number of statements that are contested by the parties. First, Ms. Hochniuk asserts that she was "diagnosed" with chronic fatigue. This statement is not true to the extent that Ms. Hochniuk asserts that she was diagnosed with chronic fatigue syndrome. In the report, Dr. Schiff states that Ms. Hochniuk was having difficulty with "chronic fatigue" and that the results of Ms. Hochniuk's gammaglobulin test for chronic fatigue syndrome were "variable". This is not a diagnosis of chronic fatigue syndrome. While Dr. Schiff's notes state at the top next to the word diagnosis, "Chronic Fatigue", it is important to note that this is not a diagnosis of chronic fatigue syndrome. A "syndrome" is defined as "a set of symptoms that occur together." Dorland's Illustrated Medical Dictionary (30<sup>th</sup> Ed. 2002) at 1808. Here, Dr. Schiff is simply stating that Ms. Hochniuk is experiencing

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<sup>12</sup> The word "Clonopin" probably represents an error in transcription. Dr. Schiff probably was referring to Klonopin, a drug used to treat seizures or panic/anxiety disorders.

chronic fatigue and therefore, Ms. Hochniuk's assertion that Ms. Hochniuk was diagnosed with chronic fatigue syndrome is not credited.<sup>13</sup>

Second, Ms. Hochniuk asserted that Dr. Schiff "cleared" her of the diagnosis of asthma. See Contested and Uncontested Facts, filed Oct. 31, 2008, at 30. Dr. Schiff's report states that there was no evidence of exercise-induced asthma, exhibit 19 at 39; but his statement does not mean that he "cleared" Ms. Hochniuk of asthma. Testimony from qualified experts about the implications of Dr. Schiff's finding that he did not see evidence of exercised-induced asthma may be appropriate.

Dr. Schiff's report also states that Ms. Hochniuk had a "possible reaction to Hepatitis B vaccine." However, this statement, by itself, does not mean that Ms. Hochniuk is entitled to compensation. See footnote 9 above.

On February 26, 1999, Ms. Hochniuk presented to Mr. Audette, with complaints of chronic fatigue. Her symptoms were that she sleeps 6-18 hours a day and rarely feels rested upon waking, cramps in sides, headaches, dizziness upon rising, nausea, craves sweets and carbs, bad memory, feeling hot, feel heavy and has a bowel movement once to twice a day. Exhibit 15 at 2.

Ms. Hochniuk testified that she was prescribed Adderall in March of 1999 which, according to her mother, helped her become "a little more alert." Tr. at 109, 180. This testimony is credited. Exhibit 13 at 4, 12-13; exhibit 75.

On April 2, 1999, Dr. Schiff prepared a letter to Dr. Hernandez describing Ms. Hochniuk as continuing "to have chronic fatigue and has very little exercise tolerance. She has essentially

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<sup>13</sup> Although Dr. Schiff did not diagnose Ms. Hochniuk as suffering from "chronic fatigue syndrome," another doctor might make this diagnosis. See 42 U.S.C. § 300aa-13(a) (stating that a petitioner may rely upon medical records or medical opinions).

had to give up her karate. She has been able to go to school but barely makes it through the day. She has difficulty concentrating. She has periods of lightheadedness but not overt dizziness. She has not lost consciousness. She has a poor appetite.” Dr. Schiff notes that Ms. Hochniuk’s tests demonstrated elevated alpha interferon, antiperoxidase antibodies and positive anti-thyroglobulin but normal thyroid function. Dr. Schiff recommended placing Ms. Hochniuk on Synthroid to see if there was any improvement to her condition should Ms. Hochniuk have a thyroid dysfunction. Exhibit 19 at 31-33.

Ms. Hochniuk testified that she started to suffer from irritability, mood swings, vision symptoms, and ringing in the ears six to twelve months after her second Hepatitis B vaccination. Tr. 130-31. Collectively, the progress notes from Mr. Audette document that Ms. Hochniuk complained of all these symptoms, therefore her testimony is credited.

On May 10, 1999, Ms. Hochniuk presented to Dr. Grubb where she underwent tilt table testing, and was diagnosed with Postural Orthostatic Tachycardia Syndrome (“POTS”). Dr. Grubb is a cardiologist and the Director of Cardiac Electrophysiology and Pacemaker Laboratories located in Toledo, Ohio. Ms. Hochniuk reported to Dr. Grubb that her symptoms of lassitude, “progressive fatigue” and lightheadedness, started within one week of her hepatitis B vaccination. Exhibit 4 at 3, 5, 7; tr. 39- 41. A finding was previously made that Ms. Hochniuk did experience fatigue and lightheadedness within a week after her August 4, 1998 vaccination.

Dr. Grubb’s medical records indicate that Ms. Hochniuk reported that during her mononucleosis she had a “fever . . . URI-like symptoms, as well as a tremendous amount of fatigue. However, she seemed to be doing a good bit better after a while and was making slow

but progressive recovery until August 4 of 1998 when she had her second hepatitis B vaccine.” Exhibit 4 at 3.<sup>14</sup>

Dr. Grubb also noted that Ms. Hochniuk may have “some kind of smoldering autoimmune disorder that could have been triggered by either the vaccinations or the mononucleosis (it is really difficult to tell which.)” Exhibit 4 at 4.

In the fall of 1999, Ms. Hochniuk moved from Florida to Virginia and she enrolled in the Virginia Governor’s School in Richmond, Virginia for her tenth grade. Tr. 235-236. To be enrolled in the Governor’s School, Ms. Hochniuk was required to qualify academically by passing certain standardized tests. Ms. Hochniuk’s Stanford Achievement Test results for her ninth-grade year placed her in the 69th to 99th percentile. Ms. Hochniuk scored in the 99th percentile for math. On the Otis-Lennon School Ability Test, Ms. Hochniuk scored in the 96th percentile. Exhibit 39 at 35; see tr. 42.

The Virginia Governor’s school is an “exclusive high school for high academic achievers.” The school is demanding with regard to its academic expectation of its students. Tr. 42, tr. 239. Ms. Hochniuk was placed into honors classes and/or accelerated learning classes. Tr. 184.

However, Ms. Hochniuk continued to struggle with her energy. Her mother would pick her up from school and she would fall asleep in the car on the way home (approximately 5 minutes away). On occasion, Ms. Hochniuk’s mother had difficulty rousing her from her sleep.

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<sup>14</sup> Ms. Hochniuk has not established that Dr. Grubb has determined that the hepatitis B vaccine caused Ms. Hochniuk to experience an adverse reaction. Dr. Grubb’s note states it was “really difficult to tell” which event, the mononucleosis or the hepatitis B vaccine, may have been the trigger for any autoimmune disorder.

Tr. 182-183. After Ms. Hochniuk was finished with school for the day, she would come home, sleep, and try to do homework. Her mother would sometimes wake her up at her desk because she'd fallen asleep. Ms. Hochniuk admitted that she continued to get good grades, although "there was a lot more behind the scenes work to be done." Tr. 184-185.

In October 1999, Ms. Hochniuk went to see a dermatologist due to a bump on her scalp, which eventually needed surgery. Exhibit 13 at 14, 20; tr. 117-118.

Other than Ms. Hochniuk's dermatological visit in October 1999, visits with mental health practitioners, and a visit on April 19, 2000 to Dr. Bellanti - the expert retained by Ms. Hochniuk in this litigation, she did not see a doctor until May 24, 2000. Exhibit 13, exhibit 14. Ms. Hochniuk continued to experience fatigue during this time period. Exhibit 13 at 10, tr. 118-119. Ms. Hochniuk makes a note of "fatigue" in the patient medical history form she completed for Dr. Bellanti. Exhibit 14 at 36. Therefore, her testimony is credited.

When Ms. Hochniuk presented to Dr. Martha Saunders, a pediatrician, on May 24, 2000, she reported an ear ache and sore neck. Ms. Hochniuk was given a prescription for antibiotics and ear drops. The progress note from this visit makes no mention of fatigue. Exhibit 13 at 14.

In her affidavit, Ms. Hochniuk states the following about Virginia Governor's School: "[i]t was a school for gifted students and I thrived in the demanding academic and culturally diverse atmosphere. Students and teachers challenged you to think, ask questions and step outside the box. Having four hours of homework a night was normal. I loved going to school so much that I didn't mind being bused into the city and leaving my house at seven o'clock in the morning and returning from school as late as five o'clock in the evening just to be able to attend class." Exhibit 44, ¶ 9. Her testimony on this point is credited.

However, in the chart of contested/uncontested facts (page 37), Ms. Hochniuk asserted that it was difficult for her to “understand a simple concept in a book and have someone explain it to her. So, although her grades stayed up, she had to put much more work into her school work.” Although Ms. Hochniuk may have had to spend more time doing her work, the statement that she could not understand simple concepts in a book is not credited. Ms. Hochniuk was an excellent student through the tenth grade, achieving high marks in school and on standardized examinations. Therefore, her testimony is not credited on this point.

In the spring of 2000, Ms. Hochniuk took a “Virginia Standards of Learning Assessment” for Algebra II. She scored 46/50 and was found to have “Advanced Proficiency.” Exhibit 39 at 32.

In March 2000, Ms. Hochniuk also began to see Dr. Mary Jane Sale, Ph.D., P.C., for therapy sessions to discuss ongoing issues, such as her conflict with her parents, her sick grandmother and her need for autonomy from her parents. Exhibit 16 at 5-22.

Dr. Sale’s intake notes state “prior to [Ms. Hochniuk’s] Hep. B. shot, bedridden w/ mono, cont’d w/ [Tae Kwon Do] + made it worse.” Exhibit 16 at 14. Ms. Hochniuk denies telling Dr. Sale that she was bedridden. Instead, Ms. Hochniuk testified that she was giving Dr. Sale her medical history and she was explaining that she was sleeping more often. Tr. 243. Ms. Hochniuk’s testimony that she was not “bedridden” is credited here. Neither one of her parents stated that Ms. Hochniuk was bedridden and there are no other medical records concurring on this point. If Ms. Hochniuk was, in fact, bedridden, this is a fact that is likely to be remembered by the parents and documented in medical records.

Dr. Sale also noted that Ms. Hochniuk “procrastinates a lot; eating, exercising” and that she was “exceedingly perfectionistic.” Dr. Sale’s notes go on to state: “Heather smilingly spoke of telling mother that she sometimes wastes time when she’s supposed to be studying. Her mom had become [sic] angry. Heather acknowledged that there is a bit of rebellion in doing things by her own “clock [.]” Exhibit 16 at 15.

Ms. Hochniuk’s final GPA for her tenth grade year was 3.3750. Exhibit 11 at 2.

On June 14, 2000, Ms. Hochniuk was treated for a sore throat and enlarged tonsils. She was given antibiotics. The progress note from that visit also states “? mono now.” Exhibit 13 at 10.

On November 15, 2000, Ms. Hochniuk underwent a neuropsychological evaluation with Dr. Elane Farace, Ph.D., an assistant professor of neurosurgery at the University of Virginia Health System - Department of Neurological Surgery. Ms. Hochniuk complained that she was depressed and was prescribed Paxil, an anti-depressant. Tr. 187-188.

On November 21, 2000, Dr. Farace sent a letter to Dr. Sale stating, “On preliminary examination, [Ms. Hochniuk] does not appear to have any significant cognitive difficulties. A number of concerns regarding how she and her parents regard her school performance were raised. An intervention involving the family will need to be planned.” Exhibit 23 at 28-34.

Ms. Hochniuk testified that during the first half of her eleventh year, her symptoms got progressively worse. She testified that it was difficult for her to get out of bed, difficult for her to stay awake and do homework, she usually fell asleep in the car on the way home from school, and she was having concentration difficulty. She also became frustrated because she felt that she was getting progressively worse and that no one could help her. Tr. 45, tr. 115, tr. 186-188. Ms.

Hochniuk's testimony is credited insofar as she seemed to be experiencing increased fatigue at this time. However, Ms. Hochniuk was able to maintain most of her grades during this time. At the end of the first semester of her eleventh grade year, Ms. Hochniuk received an interim progress report that showed that Ms. Hochniuk was passing most of her classes with the exception of receiving a failing grade in one course and an incomplete in another. In her Latin II and Spanish II classes, she was commended for her work and study habits. Ms. Hochniuk also received in A in her chemistry course and was commended for using her time wisely. Exhibit 39 at 30. During the Christmas Break of her eleventh grade year, however, Ms. Hochniuk withdrew from school on medical leave. Exhibit 11 at 40, 42, tr. 45, tr. 187.

During this time, Ms. Hochniuk was seeing a behavior cognitive therapist<sup>15</sup>. She was prescribed Paxil for her symptoms. Exhibit 16, 17, tr. 187.

On February 6, 2001, Ms. Hochniuk was diagnosed with Depressive Disorder and Obsessive Compulsive Disorder (OCD). Testing performed by Dr. Jennifer M. Sayre, Ph.D., a resident in psychology, on February 6, 2001, revealed that Ms. Hochniuk had "'Average' to 'High Average' range cognitive abilities with evenly developed verbal and non verbal skills. Her achievement functioning is quite strong across reading, writing, and math, and there is no evidence of a learning disorder." Exhibit 6 at 8.

On March 1, 2001, Ms. Hochniuk and her family started family counseling with Dr. David Waters. Dr. Waters's notes stated, in part, that "[Ms. Hochniuk] lets herself off the hook at 1<sup>st</sup> sign of failure or difficulty." Exhibit 39 at 17.

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<sup>15</sup> Ms. Hochniuk does not name the "cognitive therapist" to whom she refers. However, a review of the records during this time period indicate that the therapist probably was Dr. Jane Sale, a Clinical Psychologist.

Ms. Hochniuk withdrew from Governor's school completely and repeated the 11<sup>th</sup> grade at Powhatan High School. Tr. 49. In the middle of this repeated eleventh grade school year, Ms. Hochniuk and her family moved to Pennsylvania. Ms. Hochniuk attended Notre Dame High School. Tr. 50. She finished the eleventh grade school year with a 3.87 GPA. Tr. 51. Ms. Hochniuk's father testified that Ms. Hochniuk continued to have issues with fatigue, i.e., she would have difficulty getting out of bed and she would sometimes sleep for 20 - 24 hours. Tr. 51. Ms. Hochniuk's testimony is credited insofar as she testified that she continued having increased issues with fatigue.

Ms. Hochniuk continued at Notre Dame High School for her twelfth grade year. Id. However, her academic performance declined. She began to fail a number of her classes. Tr. 52. Ms. Hochniuk sought permission to complete the remaining classes necessary for her to graduate from high school through an approved at-home course called Keystone. Tr. 53. Although Ms. Hochniuk did not complete the Keystone course in time to graduate with her class, she did complete the course and graduated from high school. Exhibit 76 (school records), tr. 54-55.

On December 16, 2002, Ms. Hochniuk presented to Dr. Robert Doll, an endocrinologist, who noted that she "has had evidence of mild thyroid gland failure dating back to at least June of 1999." Exhibit 73 at 13. Whether Ms. Hochniuk actually had a mild thyroid gland failure in June 1999 is not clear. In April 1999, Dr. Schiff had suggested Synthroid to see if her condition improved. Exhibit 19 at 31-33.

During an interview on March 2, 2004, at the University of Pennsylvania Health System Department of Psychiatry, Center for Cognitive Therapy, Ms. Hochniuk reported that after leaving Virginia Governor's School, she was able to obtain a 3.9 G.P.A and ranked 3<sup>rd</sup> in her

class when she repeated her eleventh grade year. Ms. Hochniuk also reported that she had been a “chronic shoplifter since 11<sup>th</sup> grade. She sometimes feels entitled to shoplift because she thinks things cost too much.” Ms. Hochniuk also stated that in twelfth grade, she “really let herself go. She started having trouble in school for the first time because she wasn’t doing any work and spent a lot of time ‘pretending to do work and avoiding things.’ She received many detentions and was constantly at meetings with school disciplinarians.” Exhibit 54 at 112-113.<sup>16</sup>

Ms. Hochniuk applied to several colleges and was accepted to Philadelphia University and Cabrini College. Tr. 55. She began attending Cabrini College in the fall 2004. By the time of the hearing, Ms. Hochniuk had not graduated from Cabrini college. She has failed or withdrawn from at least ten courses. Exhibit 78, tr. 56. Her testimony is credited on this point.

In March 2004, Dr. Sullivan diagnosed Ms. Hochniuk with Polycystic Ovarian Syndrome (PCOS). Exhibit 69 at 11.

Ms. Hochniuk testified that she currently suffers from a range of physical and possibly psychological problems. These problems, as alleged by Ms. Hochniuk include, but are not limited to, chronic fatigue, headaches, dizziness, eczema, psoriasis, allergies, depression, anxiety, obsessive compulsive disorder (OCD), gastroesophageal reflux disease (GERD), polycystic ovarian syndrome (PCOS), postural orthostatic tachycardia syndrome (POTS), impaired vision,

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<sup>16</sup> Ms. Hochniuk denied that she was a “chronic shoplifter” in the Statement of Contested and Uncontested Facts, filed Oct. 31, 2008, at 42. However, Ms. Hochniuk cited no evidence to support her denial and a review of the transcript has not identified any passage in which Ms. Hochniuk testified that the record was not correct. Thus, a preponderance of the evidence supports a finding that in 11th and 12th grade, Ms. Hochniuk stole from stores.

However, the significance of this fact is not readily apparent. Whether Ms. Hochniuk stole items in 11th and 12th grade seems not to be relevant to whether the hepatitis B vaccinations, which she received years earlier, impaired her health.

she bruises and bleeds easily, has cold hands and feet, and has occasional ear ringing. Exhibit 46 at 7, 9-13, exhibit 51 at 10-11, exhibit 72 at 7-9, tr. 197-201. As a result of these numerous conditions, Ms. Hochniuk doubts her ability to complete college, she states that she is unable to maintain her energy to undertake extracurricular physical activities, her thought processes are “foggy”, her concentration level is slow and she has difficulty with her short term memory. Exhibit 44 (affidavit of Ms. Hochniuk, dated April 29, 2007, at pp. 4-5). Ms. Hochniuk also complains that she continues to suffer from depression and anxiety creating a “very challenging learning environment” for her. Id. at 5-6.

Ms. Hochniuk currently takes a number of medications to address her symptoms and conditions. Among these medications are antidepressants, thyroid medication, and allergy medication. Ms. Hochniuk also suffers from a number food allergies and takes medication to control these allergies as well. She continues to take medications to control her asthma. Id.

Ms. Hochniuk has also experienced a large weight gain over the past ten years. Just prior to her first hepatitis B vaccination in August 1997, Ms. Hochniuk weighed approximately 114 pounds. In May of 2004, she weighed 188 pounds. By May of 2006, Ms. Hochniuk weighed over 220 pounds. She stands at 5'4.

### **III. Conclusion**

Ms. Hochniuk should anticipate planning for her submission of an expert report based upon these facts. The parties should also be prepared to discuss whether Dr. Hernandez should be deposed. See Statement of Contested and Uncontested Facts, filed Oct. 31, 2008, at 24. The parties are instructed to call Francina Segbefia, at (202) 357-6358, to schedule the next status conference.

**IT IS SO ORDERED.**

S/ Christian J. Moran

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Christian J. Moran  
Special Master